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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PAYNE,

Defendant and Appellant.

2d Crim. No. B211005
(Super. Ct. No. TA094012)
(Los Angeles County)

Michael Payne appeals a judgment following his conviction of first degree murder (Pen. Code, § 187, subd. (a), 189),¹ with jury findings that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that he used and discharged a firearm causing the death of Anthony Boyd (§ 12022.53, subds. (b), (c) & (d)). We conclude, among other things, that 1) a trial witness who stood near Payne at the scene of the shooting was not an accomplice; 2) but, even so, there was sufficient evidence to corroborate his testimony; 3) Payne has not shown ineffective assistance of his trial counsel; but 4) the trial court committed sentencing error by imposing a 10-year gang enhancement. We strike the enhancement. In all other respects, we affirm.

¹ All statutory references are to the Penal Code.

FACTS

Delvon Hebrard had known Payne "[f]or a couple of years." Hebrard testified that Payne was a member of the Mob Piru, a "Blood gang." At 1:00 a.m., on June 12, 2006, Hebrard was at home when he heard Payne arguing with Anthony Boyd. Boyd was across the street from Payne. Hebrard went outside and walked to the side of the street where Payne was standing, in front of an apartment building. He observed the continuing argument between Payne and Boyd, but he did not participate.

At one point during the argument, Payne went to the rear of the apartment building, obtained a gun and came back to the street. As the arguing continued, Hebrard started to walk away. He then saw Payne point a gun at Boyd, and he heard two or three gunshots. Hebrard said Boyd had not pointed a gun at Payne, and he did not see Boyd holding any gun. He did not know that Payne was going to shoot Boyd. Hebrard was six feet two inches tall and, at the time of the shooting, wore his hair in braids. He said that he was taller than Payne.

Frank Cano testified that at 1:00 a.m., on June 12, 2006, he was in the bathroom of his home when he heard an argument on the street. He looked out his window. He saw a tall man with braided hair and a short man holding a gun behind his back on one side of the street. Boyd was across the street. The short man yelled at Boyd, "Where you from?" Boyd responded, "I ain't from nowhere." The short man replied, "Man, I'm from the Mob. [¶] . . . [¶] Fuck it then." He then pointed the gun at Boyd and fired three shots. Boyd did not have a gun or knife in his hands.

Cano testified that the man with braided hair did not say anything to Boyd and did not have a gun. "He was just standing there" Cano said that nothing blocked his vision. He saw the face of the taller man, but he was not able to "clearly" see the face of the shorter man with the gun. He was subsequently able to identify the taller man with braided hair as Hebrard.

The police showed Cano six photographs. Cano picked out a photo of Payne and told police it "looks like the guy with the gun." On cross-examination, Cano

said he was unable to say that Payne was the shooter; he could only say "it looks like him." Payne's counsel asked Cano, "You're not even really certain it looks like him, right?" Cano: "Right." Payne's counsel: "And the reason you couldn't identify the shooter is because you never got a good look at him, right?" Cano: "Right."

Sheriff's Detective Peter Hecht, a gang expert, testified that Payne was a member of the Mob Piru gang and his tattoos on his body show his gang affiliation. The area where the shooting occurred is Mob Piru turf. Hecht said, "When someone asks you where are you from in the gang community that's generally a challenge." When a gang member is confronted, "he will almost always retaliate. [¶] . . . If he doesn't he will be considered weak and he could become a victim of his own gang for not standing up for his gang."

Vladimir Levicky, a deputy medical examiner, testified that Boyd died as a result of a gunshot wound to the head. The autopsy photographs were admitted into evidence without objection.

Payne did not testify, and the defense called no witnesses.

DISCUSSION

I. *Accomplice Testimony*

Payne contends there is insufficient evidence to support the judgment. He claims Hebrard was an accomplice and there was no evidence to corroborate his testimony. We disagree.

A conviction may not be based on the testimony of an accomplice unless that testimony is corroborated by other evidence. (*People v. Hoover* (1974) 12 Cal.3d 875, 879.) To be an accomplice, the witness must have aided the defendant and acted with "guilty knowledge and intent with regard to the commission of the crime." (*Ibid.*) On appeal, we "resolve all inferences and inconsistencies in favor of the jury's implied finding that [the witness] was not an accomplice." (*People v. Tewksbury* (1976) 15 Cal.3d 953, 962.)

Hebrard testified that he was not a "lookout" for Payne. He stood near him, but he did not "provide moral support" for him. He said that he did not know that Payne was going to shoot Boyd. Cano testified that Hebrard did not yell at Boyd and did not have a gun. Hebrard "was just standing there" From this testimony, the reasonable inference is that Hebrard did not assist Payne in committing the crime and was not an accomplice.

But, even if he was, the result is the same because there was evidence to corroborate his testimony. "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) Although Cano could not see the shooter's face, his testimony nevertheless corroborated Hebrard on many of the details of the shooting incident. The evidence was sufficient. (*Ibid.*)

II. *Ineffective Assistance of Counsel*

Payne contends that he received ineffective assistance of counsel. We disagree.

To establish ineffective assistance, Payne must show that 1) his counsel's performance was deficient, and 2) "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

A. *Not Making a Section 1118 Motion*

Payne claims his trial counsel was ineffective by not making a motion for acquittal (§ 1118) at the close of the prosecution's case. He argues the evidence was insufficient because there was no corroboration of Hebrard's testimony. But as discussed in point I, there is no merit to this claim. Consequently, even if there was an omission by counsel, Payne cannot satisfy the second *Strickland* prong.

B. *Not Objecting To Autopsy Photos*

Payne contends his lawyer's performance was deficient because he did not object to the admission of autopsy photos. But trial counsel may decide not to object to highly relevant prosecution evidence. A mere claim on appeal that this was an

omission, without any showing of incompetence or inadvertence from the record, "is an insufficient basis from which to infer that counsel rendered ineffective assistance." (*People v. Williams* (1988) 44 Cal.3d 883, 934; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

The photographs were relevant evidence. They were used to assist the prosecution in establishing its case. "Autopsy photographs of a murder victim are always relevant at trial to prove how the crime occurred; the prosecution need not prove these details solely through witness testimony." (*People v. Carey* (2007) 41 Cal.4th 109, 127.) "[T]heir relevance is not lessened . . . because the cause of death was undisputed." (*Id.* at p. 128.) From this record, Payne has not shown ineffective assistance.

C. Not Objecting to Gang Tattoo Evidence

Hecht testified about several different gang tattoos on Payne's body. In describing the tattoos on his shoulders, Hecht said, "On the left shoulder he has the letter CK CK represents Crip Killer." Payne's trial counsel did not object. Payne claims this was ineffective assistance because this evidence should have been excluded and the term Crip Killer was prejudicial.

But in a case where a defendant's gang membership is at issue, a gang expert may testify about gang culture and habits. (*People v. Gardeley* (1997) 14 Cal.4th 605, 617.) "The use of expert testimony in the area of gang sociology and psychology is well established." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.) Evidence that the defendant had gang tattoos on his body is relevant to demonstrate his membership in a particular gang. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) Here Hecht said that Payne had tattoos that showed his affiliation with the Mob Piru gang.

Payne contends his counsel failed "to [a]ddress" the "[c]haracterization of the [i]nitials 'CK.'" He claims this was a critical omission because Hecht "offered no reason nor explanation of the term 'Crip Killer.'" But Hecht's testimony showed that CK

for "Crip Killers" referred to the Mob Piru gang's rivalry with another gang. He said the Crips gang was a rival of both the Bloods and Mob Piru gangs. That explained the reason why a member of the Mob Piru gang would have a tattoo that showed derision for the Crips. This evidence was highly probative as it showed Payne's gang identity, a relevant fact for the prosecution's case.

Payne suggests that his counsel should have asked Hecht additional questions about his knowledge about the derivation of the terms CK and Crip Killer. But counsel may have had a sound tactical reason for not doing so. Further inquiry could have invited Hecht to testify about a history of retaliatory gang murders between these gangs, a topic reasonable defense counsel would want to avoid.

But even if counsel had been deficient in not objecting, Payne has not shown any reasonable probability that the result would change had the terms CK and Crip Killer been excluded. Hecht's testimony on this issue was very short. The prosecution's case was strong and the evidence of Payne's guilt is compelling.

D. Not Calling an Expert Witness on Eyewitness Identification

Payne contends his trial counsel should have called an expert witness on eyewitness identification. He claims this would have helped to refute the prosecution's evidence.

But, as the Attorney General notes, Payne's counsel conducted an extensive cross-examination of Cano. He was able to obtain an admission that when first questioned by the police, Cano did not mention that he had seen the shooting. He examined Cano about his inability to see Payne's face and the distance from which he observed the shooting.

Payne suggests that an expert on eyewitness testimony would have been able to explain to the jurors the various factors that they should consider before accepting such testimony. But he has not shown how that would change the result.

The trial court instructed the jury with CALCRIM No. 315, an instruction on how to evaluate eyewitness testimony. It provides, in relevant part, "In evaluating

identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation[?] [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] Was the witness able to identify other participants in the crime? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty."

This instruction gave jurors comprehensive guidance on the various methods to evaluate eyewitness testimony. Consequently, a reasonable juror would know the factors to be considered in evaluating Cano's and Hebrard's testimony. Because of this, Payne's counsel could reasonably conclude that calling an expert to discuss these factors would be unnecessary or duplicative. He could be satisfied that his cross-examination of Cano was extensive and effective. Moreover, an expert on eyewitness testimony would not assist the defense in challenging Hebrard's ability to identify Payne. Hebrard testified that he had known Payne "[f]or a couple of years." Payne also has not shown from this record how this alleged omission was prejudicial.

III. *The 10-Year Gang Enhancement*

The trial court sentenced Payne to 25 years to life on count one, first degree murder. It imposed a 25-year consecutive term for the firearm enhancement. It then stated, "For the gang findings pursuant to Penal Code section 186.22 (B)(1)(C), the court is going to impose an additional ten years consecutive." But because the court had sentenced Payne to 25 years to life, the 10-year gang enhancement was unauthorized. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007.)

The 10-year gang enhancement is stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Kelvin D. Filer, Judge
Superior Court County of Los Angeles

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